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November 18, 2016

**VIA FIRST CLASS MAIL**

Ms. Rachel Dickon  
Assistant Secretary of Federal Maritime Commission  
800 North Capitol St.  
Room 1046  
Washington, D.C. 20573

Re: Docket No. 15-11 – Ovchinnikov v. Hitrinov

Dear Ms. Dickon:

Enclosed for filing in the above-captioned matter are an original true copy and five (5) additional copies of:

1. Response to Complainants' Mis-Filed Motion to Avoid Ethical Investigation

If you have any questions, please do not hesitate to contact me.

Best regards,

Eric Jeffrey

Enclosures

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WASHINGTON, D.C.

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DOCKET NO. 15-11

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IGOR OVCHINNIKOV, ET AL

v.

MICHAEL HITRINOV ET AL

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Consolidated With  
DOCKET NO. 1953(I)

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KAIRAT NURGAZINOV, ET AL

v.

MICHAEL HITRINOV ET AL

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**RESPONSE TO COMPLAINANTS' MIS-FILED  
MOTION TO AVOID ETHICAL INVESTIGATION**

On November 17, 2016, Complainants filed what they style as a "Response" to the undersigned's motion to withdraw as counsel for Respondents Empire United Lines and Michael Hitrinov.<sup>1</sup> Despite the misleading title, Complainants spend considerable space addressing an entirely different matter upon which they do not respond, but rather request relief – the complaint pending before the Commissioners on Exceptions regarding ethical breaches by Complainants' Counsel (i.e., Messrs. Nussbaum and Katz). Thus, for example, the heading on page 8 states that

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<sup>1</sup> Carcont Ltd., although named in the Complaint, has never been served, is without counsel in this matter, and is not in any event an entity subject to regulation under the Shipping Act. Despite repeated requests by the Presiding Officer, and the admission of Complainants' Counsel that Complainants have no ability to proceed against Carcont, Complainants have struthiously refused to address this matter.



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the undersigned's "motion [sic]" to the FMC for an Order to investigate Counsel's ethical lapses "should be denied or in the alternative, deemed withdrawn or abandoned." See also p. 9.

Complainant's request for relief could, and should, be denied for the simple reason that it is addressed to the wrong decision-maker at the FMC. The undersigned's motion to withdraw is pending (properly) before the Presiding Officer, while the Exceptions, to which Complainants' Counsel have responded, are pending before the Commissioners.<sup>2</sup>

Nevertheless, from an abundance of caution the undersigned addresses briefly and in two parts the faulty motion of Complainants' Counsel. First, we clear away some of the underbrush by correcting a few of the factual misstatements made by Complainants' Counsel either with clear knowledge of their falsity or with at best reckless disregard for their truth or falsity. Second, we demonstrate that Counsel's motion is utterly baseless.

**A. False Statements of Fact**

1. Counsel assert [p. 2 & p. 8] that the Exceptions were filed without "the knowledge and consent of his client[s]." Absent a very serious ethical breach, Complainants' Counsel have no way of knowing whether my clients consented to or knew about the Exceptions, so this is simply reckless speculation and yet another violation of the ethical rules. Although there was no need for such consent as a matter of law,<sup>3</sup> Counsel's wild and unsupported assertion of fact is simply untrue – my clients were, and remain, fully knowledgeable about and supportive

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<sup>2</sup> This is simply another example of Counsel's persistent refusal to become familiar with the Rules of the FMC. As specifically addressed in Rule 153, an interim appeal of a specific decision by the Presiding Officer does not stay the proceeding before the Presiding Officer.

<sup>3</sup> As previously explained, the obligation to report ethical lapses is imposed by the Model Rules *only on counsel*. Neither of my clients is subject to the Model Rules, but I am.

of both the original motion before the Presiding Officer and the Exceptions now pending before the Commissioners.

2. Counsel assert [p. 2 & p. 8] that the undersigned “purports to have ceased communications” with his clients. Again, that fanciful assertion is simply false, and based on nothing. What I said in my motion to withdraw is that my clients did not respond to recent emails on the specific matter of unpaid invoices.

3. Counsel assert [p. 2], in a sentence that is otherwise grammatically impossible to parse, that I “falsely represented” in the Exceptions that the motion for judgment on the pleadings pending before the Presiding Officer is “fully briefed.” Here, in contrast, is the actual quote, the deliberate mischaracterization of which is yet another in Counsel’s long line of ethical failures:

“Briefing on that Motion was completed July 26, 2016, and it is currently awaiting decision (although we understand that the Presiding Officer may request additional briefing).” Exceptions p. 4, n.2.

Thus, not only does the supposed quote of “fully briefed” appear nowhere in the Exceptions, but also, and more importantly, the undersigned specifically acknowledged that the Presiding Officer had indicated that further briefing might be requested.<sup>4</sup>

**B. Failure to Provide Grounds for Relief**

Complainant’ Counsel assert that withdrawal of the undersigned would require or justify denial or presumed withdrawal of the ethical complaint now pending against them before the

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<sup>4</sup> Complainants’ Counsel curiously mischaracterize the statement by the Presiding Officer that he might request further filings as “recent[.]” That statement was made, as Counsel admits, on October 5, 2016. Some 44 days have passed since that remark was made, but no such request has been made by the Presiding Officer.

Commission. Apart from making their argument to the wrong level at the FMC, Counsel suggest no legal basis why that should be, and indeed they are way wide of the mark.

Counsel correctly note that the motion before the Presiding Officer and the Exceptions were filed solely on behalf of the undersigned. As explained repeatedly, however, this is because it is the undersigned, not the parties, who is subject to the Model Rules and who is required to report ethical misconduct to the Commission. That obligation would remain even if I were not part of that proceeding, so long as I was aware of the violations. The motion and Exceptions were thus filed by me not as a representative of my clients, but as an independent matter based on my being an attorney who practices before the Commission. I still am and will remain such an attorney, and so my obligation continues whether or not I continue to represent these clients in this proceeding.

Furthermore, the motion and Exceptions do not create an adversary proceeding between me and Messrs. Nussbaum and Katz. Rather, they simply discharge my obligation under the Model Rules to inform the Commission of the lapses. The information is now in the hands of the Commissioners, including Counsel's response, and so it is entirely up to the Commissioners to decide what to do. Should the Commissioners decide to take action, I would not be a party to that proceeding or to any subsequent judicial review. Likewise, should the Commissioners decline to take action, I would not be an aggrieved party and would not have standing either to request reconsideration or seek judicial review.

As previously described, the form I used to bring the matter to the attention of the Commission was adopted in the absence of any specified procedures and on the advice of the Office of the Secretary. The reality, however, is that it is no different than if I had simply filed a

notice of ethical violations. The violations do not disappear if I do, and neither does the Commissioner's authority to act thereon.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eric Jeffrey", written over a horizontal line.

Eric Jeffrey

**Nixon Peabody LLP**

799 9<sup>th</sup> Street, N.W., Suite 500  
Washington, D.C. 20001  
202-585-8000

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing Response to Complainants' Mis-Filed Motion to Avoid Ethical Investigation by first class mail to the following:

Marcus A. Nussbaum, Esq.  
P.O. Box 245599  
Brooklyn, NY 11224  
Marcus.nussbaum@gmail.com

Seth M. Katz, Esq.  
P.O. Box 245599  
Brooklyn, NY 11224

Dated at Washington, DC, this 18<sup>th</sup> day of November, 2016.

  
Eric Jeffrey  
Counsel for Respondents